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June 26, 1989

Susan Gallinger, Director
Arizona Department of Insurance
801 East Jefferson
Phoenix, Arizona 85034-2217

Re: I89-060 (R88-037)

Dear Ms. Gallinger:

Your predecessor has asked four questions with regard to the meaning of A.R.S. § 20-485.11(C) insofar as it prohibits an insurance administrator[1] or its employees from being financially interested in any insurer, insurance agent or insurance broker. We conclude A.R.S. § 20-485.11(C) prohibits any type of financial interest by an administrator or its employees in any insurer, insurance agent or insurance broker, including the holding of an insurance agent's or broker's license by an administrator or its employees, except an interest as a policyholder or claimant under an insurance policy. We further conclude that the written agreement between the administrator and the insurer does not create a financial interest by providing that the administrator is entitled to compensation from the insurer for services rendered and that

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1/ For the purposes of A.R.S. § 20-485 to -485.13, an "administrator" is "any person who collects charges or premiums from, or who adjusts or settles claims by, residents of this state in connection with life or health insurance coverage or annuities" other than certain enumerated exceptions. A.R.S. § 20-485.

whether the statute prohibits an insurer, agent or broker from having a proprietary interest in an administrator depends upon the extent of that interest and its effect on the administrator. Each question is set forth and answered in detail as follows:

> 1. Does A.R.S. § 20-485.11(C) prohibit only proprietary interests by an administrator or its employees in an insurer, agent or broker?

A.R.S. § 20-485.11(C) provides as follows:

> The administrator or any employee of the administrator shall not be financially interested either directly or indirectly in any insurer, insurance agent or insurance broker except as a policyholder or claimant under an insurance policy. The administrator shall not receive a commission on any insurance transaction.

"Financially interested" is not defined in Title 20, but a nearly identical statutory prohibition, appearing in A.R.S. § 20-149(A),[2/] has been judicially interpreted in Bushnell v. Superior Court, 102 Ariz. 309, 428 P.2d 987 (1967). The court held that the Director of Insurance violated the statute by obtaining a personal secured mortgage loan from an insurer authorized to transact insurance business in Arizona. The court reasoned as follows:

> We think that by its use of such broad language the legislature must have intended that where there is a private or personal transaction, other than those covered by the above enumerated exceptions, between the Director of Insurance and an insurance company involving money in some

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2/ A.R.S. § 20-149(A) provides: "The director, or any deputy, examiner, assistant or employee of the director shall not be financially interested, directly or indirectly, in any insurer, agency or insurance transaction except as a policyholder of claimant under a policy."

> manner, such is a transaction forbidden by the terms of the statute. Under such a reading of the statute it is obvious that it prohibits the Director of Insurance from entering into a mortgage loan transaction with an insurance company he regulates. Such an interpretation is also consonant with the purpose of part A, which we noted above to be to prohibit the director from placing himself in a position whereby he would have a possible conflict of interest.
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> . . . . [S]uch relationships between a director of insurance and an insurance company are fraught with temptation, pressure and the possibilities of corruption--it is these latter situations which A.R.S. § 20-149 seeks to prohibit.

102 Ariz. at 311-12, 428 P.2d at 989-90.

In interpreting the scope of the statute, the Bushnell court examined the effect of the express exceptions of A.R.S. § 20-149. 102 Ariz. at 311, 428 P.2d at 989. A.R.S. § 20-149(A) excepts only the interest of "a policyholder or claimant under a[n insurance] policy" from the statute's proscriptive effect. "[I]f a statute specifies one exception to a general rule, other exceptions are excluded." Bushnell, 102 Ariz. at 311, 428 P.2d at 989.

A.R.S. § 20-485.11(C) contains identical exceptions. If the same language is used in different parts of the same statutory scheme, the legislature is presumed to intend the same meaning. State v. Superior Court, 4 Ariz. App. 373, 378, 420 P.2d 945, 950 (1966).

The 1967 Bushnell court interpretation of A.R.S. § 20-149(A) predates the enactment of A.R.S. § 20-485.11 in 1984, see Laws 1984 (2nd Reg. Sess.) Ch. 88, § 5. The legislature is presumed to use words in the sense justified by settled judicial decision. State v. Jones, 94 Ariz. 334, 336-37, 385 P.2d 213, 215 (1963). Consequently, the existing judicial interpretation of a prohibited financial interest under A.R.S. § 20-149(A) should be applied to A.R.S. § 20-485.11(C).

Thus, in answer to question one, A.R.S. § 20-485.11(C) prohibits proprietary interests and more. It prohibits any type of financial interest by an administrator or its employees in any insurer, insurance agent or insurance broker (as those terms are defined in A.R.S. §§ 20-104, -282 and -283, respectively)

except an interest as a policyholder or claimant under an insurance policy.[3/] Those interests not excepted are prohibited even if they arise from private, regular business transactions void of evil motive or personal gain by the administrator or its employees. See, Bushnell, 102 Ariz. at 311, 428 P.2d at 989.

2. Does it also prohibit an administrator or its employees from holding an insurance agent's or broker's license?

With regard to question two, an "agent" is authorized by an insurer to solicit or negotiate applications for insurance on its behalf for a "commission or other compensation directly dependent upon the amount of business obtained." A.R.S. § 20-282. A "broker" is one who for compensation as an independent contractor in any manner solicits, negotiates or procures insurance on behalf of insureds. A.R.S. § 20-283. An insurer or agent may rightfully pay "the customary commissions [to a broker] upon insurance placed through the broker." A.R.S. § 20-300(B). Consequently, the holding of an agent's or broker's license would put an administrator or its employees in position to obtain commissions or other contingent compensation from the particular insurance transactions handled by the administrator. The receipt of such a commission would violate the second sentence of A.R.S. § 20-485.11(C), "The administrator may not receive a commission on any insurance transaction."

The possibility of receipt of such a commission would violate the first sentence of subsection C. See Bushnell, 102 Ariz. at 311, 428 P.2d at 989. Even if the licensee does not represent the particular insurer who has retained the administrator, he may be tempted to urge a cancellation and conversion to his own affiliates. The situation is inescapably "fraught with temptation, pressure and possibilities of corruption." 102 Ariz. at 312, 428 P.2d at 990. We conclude that the holding of an insurance agent's or broker's license by an administrator or its employees would violate A.R.S. § 20-485.11(C).

3/ "Financial interest" pursuant to A.R.S. § 20-485.11(C) does not include agreed upon compensation for services rendered pursuant to the required written agreement between insurers and an administrator. See response to question 3 infra.

3. Does the required written agreement between the administrator and the insurer create an impermissible financial interest for the administrator in the insurer by providing that the administrator is entitled to compensation from the insurer for such services?

The legislative scheme governing insurance administrators, A.R.S. §§ 20-485 to -485.13, which prohibits an administrator from having a financial interest in an insurer, insurance agent or insurance broker, A.R.S. § 20-485.11(C), contemplates that the administrator is entitled to compensation for its services. A.R.S. § 20-485.01 provides:

> A. No person may act as an administrator and no administrator may collect a premium without a written agreement between the person as administrator and the insurer for whom the services are rendered. . . .
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> B. The written agreement shall contain provisions which include the requirements of §§ 20-485.03 through 20-485.10 except as those requirements do not apply to the functions performed by the administrator.

A.R.S. § 20-485.09 provides:

> Compensation to an administrator for any policies where such administrator adjusts or settles claims shall in no way be contingent on claim experience. This section shall not prevent the compensation of an administrator from being based on premiums or charges collected or number of claims paid or processed.

Parts of the same legislative scheme must be construed as consistent with each other. Stuart v. Winslow Elementary School District No. 1, Navajo County, 100 Ariz. 375, 383-86, 414 P.2d 976, 981-83 (1966); Weitekamp v. Fireman's Fund Insurance Co., 147 Ariz. 274, 275-76, 709 P.2d 908, 909-10 (App. 1985). A.R.S. § 20-485.01(A) requires a written agreement between the administrator and the insurer. That agreement must contain provisions which limit the methods of calculating an administrator's compensation from an insurer. The prohibited methods of calculating compensation are those that would give

the administrator a financial interest in particular insurance transactions, see A.R.S. § 20-485.09, and trigger the concerns expressed by the Bushnell court. The compensation for administrative services permitted by A.R.S. § 20-485.09 is not fraught with the same temptations. Thus, compensation to an administrator from an insurer pursuant to a written agreement that complies with A.R.S. § 20-485.09 is the administrator's lawful compensation, not a financial interest prohibited by A.R.S. § 20-485.11(C).

4. Does A.R.S. § 20-485.11(C) prohibit an insurer, agent or broker from having a proprietary interest in an administrator?

A.R.S. § 20-485.11(C) prohibits financial interests of the administrator or its employees; it does not prohibit an insurer, insurance agent or insurance broker from having a financial interest in an administrator. A fundamental rule of statutory construction is that courts will not inflate, expand, stretch or extend statutes to matters not falling within the expressed provisions. City of Phoenix v. Donofrio, 99 Ariz. 130, 133, 407 P.2d 91, 93 (1965); Arizona Security Center, Inc., v. State, 142 Ariz. 242, 244, 689 P.2d 185, 187 (App. 1984).

The statutory provisions regulating administrators require that the administrator remain separate and distinct from insurers, brokers and agents. For example, excepted from the statutory definition of an "administrator" are both an insurance company lawfully transacting insurance or lawfully acting as an insurer with respect to a policy issued and delivered pursuant to the law of a foreign jurisdiction and a licensed life or disability agent or broker whose activities are limited exclusively to the sale of insurance. A.R.S. § 20-485(3),(4). The statutory scheme contemplates further that an administrator have a written agreement with the insurer, A.R.S. § 20-485.01(A); is an intermediary between the insurer and insured, A.R.S. § 20-485.02; and acts as a fiduciary for the insurer and insured, A.R.S. §§ 20-485.06, -485.10. To the extent that the statutory scheme requires an arms-length relationship between the insurer and the administrator and defines an administrator not to include insurance companies, brokers and agents, any proprietary interest in the administrator which in fact eliminates the distinction between these separate licensees and registrants conflicts with the intent of the legislature as expressed in A.R.S. §§ 20-485 to -485.13.

Consequently, the question becomes whether the proprietary interest held by an insurer, insurance agent or broker in an

administrator compromises the required separateness sufficiently to give the administrator the type of financial interest which would place the administrator in a possible conflict of interest. "The possibilities of pressure and influence," Bushnell, 102 Ariz. at 311, 428 P.2d at 989, are what A.R.S. § 20-485.11(C) seeks to prohibit. See 102 Ariz. at 312, 428 P.2d at 990. We conclude that an insurer, insurance agent or insurance broker is not prohibited from having a proprietary interest in an administrator unless the totality of the circumstances gives the administrator or its employees a financial interest prohibited by A.R.S. § 20-485.11(C).

Sincerely,

Bob Corbin

BOB CORBIN
Attorney General

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